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10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA
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13 OFELIA RODRIGUEZ, et al.,

14 Plaintiffs,

15 vs.

16 UNITED STATES OF AMERICA, et
17 al.,

18 Defendants.
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CASE 06-CV-2753 W (JMA)

ORDER OVERRULING
PLAINTIFFS' OBJECTIONS
TO MAGISTRATE JUDGE'S
MAY 15, 2009 DISCOVERY
ORDER

20 Pending before the Court are Plaintiffs' objections to Magistrate Judge Jan M.
21 Adler's May 15, 2009 discovery order. Judge Adler denied Plaintiffs' requests to (1) re-
22 open the deposition of Chief Patrol Agent Michael Fisher; and (2) compel production
23 of members of the Disciplinary Review Board ("DRB") for deposition or, in the
24 alternative, compel the production of all documents reviewed by the DRB in deciding to
25 take "no action" against Agent Faustino Campos following the shooting death of
26 Guillermo Martinez.
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1 The court decides the matter on the papers submitted and without oral argument
2 pursuant to Local Rule 7.1(d)(1). For the reasons discussed below, the Court
3 **OVERRULES** Plaintiffs' objections (Doc. Nos. 99, 108).

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5 **I. FACTUAL BACKGROUND**

6 On December 30, 2005, Decedent Guillermo Martinez, along with four other
7 persons, attempted to enter the United States near the San Ysidro port of entry.
8 Defendant U.S.A. asserts that Decedent was smuggling aliens.

9 As Decedent and the other persons came to the secondary fence, Agent Campos
10 approached in his vehicle. When Agent Campos exited his vehicle, Decedent ran and
11 Agent Campos gave chase. During the pursuit, Agent Campos fired his weapon striking
12 Decedent beneath the shoulder blade. Despite being shot, Decedent continued to run,
13 re-entered Mexico, and proceeded to a hospital. Decedent later died due to the gunshot
14 wound.

15 Plaintiffs filed their Complaint on December 20, 2006 for wrongful death under
16 the Federal Tort Claims Act. Under the Amended Case Management Order, the
17 discovery cut-off was set for December 9, 2008.

18 On October 9, 2008, Plaintiffs propounded requests for admission ("RFAs") on
19 Defendant U.S.A. (*See Singleton Decl.* [Doc. 108-2], Ex. H at Ex. 2.) Requests 17 and 18
20 sought an admission that no U.S. Border Patrol agent or employee, and no agent or
21 employee of any agency or office of the U.S. Government, made a determination
22 regarding whether Agent Campos' shooting "was consistent with the policies and
23 procedures adopted by the [U.S.] that govern the use of deadly force by law enforcement
24 officers of the U.S." (*Id.*, Ex. H at Ex. 2, p.2.)

25 On November 12, 2008, Defendant responded to the requests by stating, in part,
26 that no such determination had been made. However, Defendant advised Plaintiffs that
27 the DRB reviewed Agent Campos' use of force to determine whether there was any
28 evidence of misconduct that would warrant administrative discipline, that the DRB

1 found no such evidence, and that the DRB did not impose discipline of any kind.
2 (*Singleton Decl.*, Ex. H at Ex. 3, pp. 3–4.)

3 On December 16, 2008, Plaintiffs sent Judge Adler a letter identifying a “list of
4 discovery issues....” (*Def.’s Ex. Part I* [Doc. No. 116-1], Ex. 5 at p.1.) Among the issues,
5 Plaintiffs sought to depose DRB members who reviewed Agent Campos’s use of force,
6 and Plaintiffs requested all documents the DRB reviewed in reaching its decision. (*Id.*)

7 On January 15, 2009, Judge Adler held a discovery hearing. During the hearing,
8 Defendant agreed to respond to two additional interrogatories regarding whether a
9 determination was made that the shooting was consistent with the policies and
10 procedures adopted by the U.S. governing the use of deadly force. (*Def.’s Ex. Part I*, Ex.
11 7 at p.13; *Def.’s Ex. Part II* [Doc. No. 116-2], Ex. 8 at pp. 3–4.) Judge Adler then denied
12 Plaintiffs’ requests regarding the DRB, subject to Defendant responding to the
13 interrogatories. (*Def.’s Ex. Part I*, Ex. 7 at p.15.)

14 On January 16, 2009, Defendant U.S.A. sent Plaintiffs a letter stating that
15 Defendant reserved the right to offer testimony as to the DRB and its conclusion about
16 the shooting at trial. Based on this reservation, Plaintiffs renewed their demand to
17 depose the DRB members and for production of the DRB’s documents. (*Singleton Decl.*,
18 Ex. G at pp. 1–2.) Later, another dispute arose between the parties regarding whether
19 Plaintiffs could re-open the deposition of Chief Patrol Agent Michael Fisher.

20 On May 15, 2009, Judge Adler held another discovery hearing regarding the two
21 issues. Judge Adler ultimately denied Plaintiffs’ discovery requests. Plaintiffs’ objections
22 followed.

23 24 **II. STANDARD OF REVIEW**

25 A party may object to a non-dispositive pretrial order of a U.S. Magistrate Judge
26 within ten days after service of the order. See FED. R. CIV. P. 72(a). The magistrate
27 judge’s order will be upheld unless it is “clearly erroneous or contrary to law.” *Id.*; 28
28 U.S.C. § 636(b)(1)(A). The “clearly erroneous” standard applies to the magistrate judge’s

1 factual determinations and discretionary decisions, including an order imposing discovery
2 sanctions. Maisonville v. F2 America, Inc., 902 F.2d 746, 748 (9th Cir. 1990) (holding
3 that factual determinations made in connection with sanction award are reviewable for
4 clear error); Grimes v. City and County of San Francisco, 951 F.2d 236, 240 (9th Cir.
5 1991) (holding that discovery sanctions are non-dispositive pretrial matters reviewable for
6 clear error under Rule 72(a)). Under this standard, “the district court can overturn the
7 magistrate judge’s ruling only if the district court is left with the definite and firm
8 conviction that a mistake has been made.” Weeks v. Samsung heavy Industries Co., Ltd.,
9 126 F.3d 926, 943 (7th Cir. 1997).

10 On the other hand, the “contrary to law” standard permits independent review of
11 purely legal determinations by a magistrate judge. See, e.g., Haines v. Liggett Group, Inc.,
12 975 F.2d 81, 91 (3d Cir. 1992) (“the phrase ‘contrary to law’ indicates plenary review as
13 to matters of law.”); 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L.
14 MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3069 at 350 & 355 (2d ed. 1997);
15 Gandee v. Glaser, 785 F.Supp. 684, 686 (S.D. Ohio 1992), Aff’d 19 F.3d 1432 (6th Cir.
16 1994) (“Thus, [the district court] must exercise its independent judgment with respect to
17 a magistrate judge’s legal conclusions.”).

18 19 **III. DISCUSSION**

20 Plaintiffs object to Judge Adler’s ruling denying Plaintiffs’ request to (1) re-open
21 the deposition of Chief Fisher, and (2) compel Defendant U.S.A. to produce the DRB
22 members for deposition or, in the alternative, compel Defendant to produce all
23 documents reviewed by the DRB in deciding whether to take “no action” against Agent
24 Campos. For the reasons stated below, the Court will overrule both objections.

1 **A. Chief Fisher's Deposition.**

2 Judge Adler denied Plaintiffs' request to re-open Chief Fisher's deposition because
3 (1) Plaintiffs were given the opportunity to ask additional questions immediately after the
4 conclusion of the original deposition, and (2) since Chief Fisher was a fact witness,
5 Plaintiffs' counsel was responsible for asking any necessary follow-up questions. Plaintiffs
6 object on the ground that Judge Adler erred in finding that Chief Fisher is a fact witness,
7 and not an expert witness.

8 But as Defendant U.S.A. acknowledges, Chief Fisher will not be offering expert
9 opinion at trial. Instead, his testimony will consist of factual information about the U.S.
10 Border Patrol's mission, organization, operations, as well as how the Border Patrol
11 conducts investigations. Given Chief Fisher's position, his testimony will be based on his
12 experience and perceptions, and does not constitute expert opinion.

13 Moreover, the Court also agrees with Judge Adler's finding that Plaintiffs were
14 given an opportunity to ask additional questions at the conclusion of Chief Fisher's
15 deposition and, later, in the form of written interrogatories. Plaintiffs chose not to ask
16 follow up questions.

17 For these reasons, Plaintiffs' objection is overruled.¹

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19 **B. The DRB Discovery.**

20 Judge Adler denied Plaintiffs' request to depose members of the DRB and for the
21 production of documents that the DRB reviewed in determining that administrative
22 discipline was not warranted against Agent Campos. These documents consist of the San
23 Diego Police Department's report of the shooting, and internal memos from the Office
24 of the Inspector General ("OIG").

25 Plaintiffs object that because Defendant U.S.A. intends to introduce evidence at
26 trial regarding "the DRB or its conclusion . . . , Plaintiffs must be permitted to depose the

27 _____
28 ¹However, because Chief Fisher was not designated as an expert, Defendant may not attempt to elicit expert testimony from him at trial.

1 three (3) members of the DRB and review any and all documents reviewed by the DRB
2 in making its decision.” (Obj., 8:18–22.) In short, Plaintiffs’ objection is premised on the
3 theory that they have not been permitted to conduct discovery relating to the DRB. The
4 Court is not persuaded.

5 Apparently, Plaintiffs did not learn about the DRB until approximately November
6 12, 2008, when Defendant, in responding to Plaintiffs’ RFAs, discussed the DRB’s review
7 of the shooting. While Plaintiffs suggest that this delay in learning about the DRB is
8 somehow attributable to Defendant, the record establishes that Plaintiffs are responsible.
9 Specifically, until propounding the RFA s two months before the discovery deadline,
10 Plaintiffs did not propound an interrogatory calling for information related to the DRB’s
11 review of the shooting. During the hearing, Plaintiffs argued that certain previously
12 propounded interrogatories required Defendant to disclose the DRB’s review. However,
13 having reviewed the transcript, the Court agrees with Judge Adler’s finding to the
14 contrary. Accordingly, Plaintiffs’ insinuation that their dely in learning about the DRB
15 is attributable to Defendant U.S.A. lacks merit.

16 Moreover, the record establishes that the documents Plaintiffs seek were either
17 produced or identified on a privilege log months before the discovery deadline. (*Singleton*
18 *Decl.*, Ex. A at pp. 29–36.) Specifically, Defendant produced the police report, but
19 refused to produce the internal OIG memos and therefore listed the memos on a
20 privilege log. Plaintiffs, however, did not challenge Defendant’s refusal to produce the
21 OIG memos until after the close of discovery. Plaintiffs again attempt to justify their
22 inaction on the ground that they were unaware of the DRB. But as discussed above,
23 Plaintiffs are responsible for the delay in learning about the DRB.

24 Finally, having reviewed the transcript of the May 15, 2009 hearing, the Court also
25 agrees with Judge Adler’s concern regarding the relevance of the documents sought,
26 particularly in light of this Court’s previous rulings. However, at this time, the Court will
27 refrain from deciding whether evidence concerning the DRB is admissible at trial.

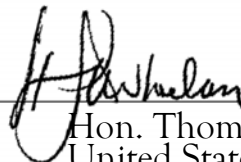
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1 **IV. CONCLUSION**

2 For the reasons stated above, Plaintiffs' objections are **OVERRULED**.

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4 **IT IS SO ORDERED.**

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6 DATED: November 6, 2009

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9 Hon. Thomas J. Whelan
United States District Judge

10 cc: All Parties
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